require the application of federal law. Nor did the Montana court in the lead case of *Willems*[5] identify any such law singling out arbitration agreements. Rather, the Montana court applied state laws to find that a fiduciary duty arose between the broker and the investors herein. This duty arose NOT from the arbitration provision contained in the contract, but from the contract provision which granted Piper control to buy, sell and trade securities in the investors' accounts whenever Piper, in its discretion, deemed it necessary or appropriate. *Willems*, ¶ 25 (App. 31-32). Thus, the *Willems* holding itself has less to do with arbitration than it has to do with the scope of fiduciary duties under Montana law. This is a matter that is appropriately left to the individual states under our federal system. *See, e.g., Aronson,* 440 U.S. at 262. Because the Montana court applied general principles of state law, and did not single out the arbitration agreement, review by this Court upon a writ of certiorari is not warranted.

In fact, the Montana court expressly identified the FAA provision (and the identical state counterpart) and applied state law as required by that Act. In the lead case of *Willems*, the Montana court expressly recognized the dictates of the FAA[6] when it held:

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[5] The *Willems* case itself is not strictly before the Court because the parties reached a settlement after the case was remanded to the District Court. However, as set forth in the Statement of the Case section, the Montana Supreme Court relied on the analysis in *Willems* in issuing non-published opinions in the six cases presently before the Court on Piper's Writ of Certiorari.

[6] 9 U.S.C. § 2 provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such

(Continued on following page)

> We conclude that the District Court created no new special legal standards but instead properly applied Montana case law by relying on *Kloss*.[7] *The FAA provides that an agreement to arbitrate is valid except where grounds exist at law or in equity to revoke the contract* . . . Montana law also requires the enforcement of predispute arbitration clauses except upon grounds that exist at law or in equity for the revocation of a contract. *Kingston v. Ameritrade, Inc.*, 2000 MT 269, 302 Mont. 90, 12 P.3d 929.

Willems, at ¶ 27 (App. 34) (emphasis added).

In *Willems*, the Montana court reviewed the provision in the Piper contracts which provided: "whenever Piper Jaffray deems it necessary for its protection, Piper Jaffray is authorized (but is not required) to: . . . Purchase sell, assign, receive and deliver all or any part of the securities held or carried for you."[8] *Willems*, ¶ 17 (App. 29). Under Montana law, "a fiduciary relationship is created whenever a broker has

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contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

[7] *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 37, 310 Mont. 123, 54 P.3d 1.

[8] Piper's contention in its Petition that the agreement's language granting broker discretion is standard in the industry was neither presented nor proven below or considered or ruled upon by the Montana Supreme Court. Although it is irrelevant to the issues before this Court, Respondents are not waiving their right to oppose this contention. Likewise, Respondents do not waive their right to oppose Piper's contentions that the account documents signed by Respondent Jim Leary did not contain language triggering a fiduciary duty, or that Respondents Shea signed or received the account documents.

discretion to buy, sell, or otherwise control a client's account." *Willems,* ¶ 14 (App. 28) (*citing Chor v. Piper, Jaffray & Hopwood, Inc.,* 261 Mont. 143, 153, 862 P.2d 26, 32 (1993). Thus, this general contract provision, having nothing to do with arbitration, created a fiduciary duty. Under Montana law, a fiduciary must make full disclosure of all facts relevant to the transaction and relationship between the parties. *See, e.g., Kitchen Krafters Inc. v. Eastside Bank of Montana, et al.,* 242 Mont. 155, 163, 789 P.2d 567, 571 (1990); *Watson v. Fultz,* 239 Mont. 364, 368, 782 P.2d 361, 363 (Mont. 1989).

The Montana court has not singled out arbitration in the application of the fiduciary duty of full disclosure. Indeed, in the case of *Murphy v. Redland,* 178 Mont. 296, 583 P.2d 1049 (1978), the Montana court applied the same fiduciary duty definition used in *Willems* to deny a joint adventurer (Redland) the right to recover damages from his fellow joint adventurer (Murphy) when the damage was caused by Redland's failure to disclose a cattle sale. Similarly, in *Deist v. Wacholz,* 208 Mont. 207, 678 P.2d 188 (1984), the Montana court found a special relationship between a bank officer and a bank customer which gave rise to a fiduciary duty on behalf of the bank officer to disclose his involvement in the purchase of a ranch.

Further evidence that the Montana court does not "single out" arbitration in the application of its fiduciary duty law can be found in the case of *Chor.* In *Chor,* the Montana court held that "in the absence of discretionary authority by a stockbroker to buy and sell in a customer's account, no fiduciary relationship is created in a broker-customer relationship." *Chor,* 261 Mont. at 152, 86 P.2d at 31-32. Because the *Chor* court found in that case that no such "discretionary authority" existed, it did not hold

Piper's broker to any fiduciary duty and it enforced the arbitration provision.

In the cases at issue herein, the Montana court (based on the *Willems* analysis), having found that Piper had retained "discretionary authority," applied the well-established rules concerning the duties of a fiduciary to disclose relevant information about the relationship. Here, Piper had an internal policy that allowed investors to "opt-out" of the arbitration requirement by simply crossing out the arbitration provision. This policy is not a written part of the agreement. In fact, it is quite unique in the securities industry. In each of the cases currently before this Court, it was undisputed that Piper failed to disclose its policy of allowing customers to "opt-out" of arbitration by crossing out the provision in the contract. The Montana court simply held that, under these exceptional circumstances, Piper, as a fiduciary, owed its investor clients the duty to disclose the consequences of the arbitration provision and this "opt-out" information. *Willems, supra,* ¶¶ 23, 25 (App. 33). Such a duty arises from state law dealing with fiduciaries and would apply to all contracts whether dealing with arbitration or not. Thus, the Montana court in *Willems* did nothing more than require such disclosure based upon the fiduciary relationship which was formed by Piper's own form agreement. Application of this fiduciary duty is therefore consistent with the FAA and as such the issuing of a Writ of Certiorari is not warranted.

State courts have issued thousands of decisions dealing with the nature and scope of a fiduciary duty. Many state courts, just like the Montana state court, quote Justice Cardozo in the case of *Meinhard v. Salmon*, 249

N.Y. 458, 164 N.E. 545 (1928),[9] who explained the nature of the fiduciary duty as follows:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Id. at 464, 164 N.E. at 546.

Central in most cases dealing with a fiduciary's duties is the idea that a fiduciary must fully disclose all relevant

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[9] *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 37, 54 P.3d 1, 9, ¶ 37, 310 Mont. 123, 135, ¶ 37. The following is a sample of the state court decisions which relied on the *Meinhard* decision in analyzing the scope of fiduciary obligations: *Lindsay v. Marcus*, 137 Colo. 336, 325 P.2d 267 (Colo. 1958); *Brown v. Halbert*, Division Three, 271 Cal. App. 2d 252, 76 Cal.Rptr. 781 (Cal.App. 1969); *In re Evans*, 113 Ariz. 458, 556 P.2d 792 (Ariz. 1976); *Ditis v. Ahlvin Const. Co.*, 408 Ill. 416, 97 N.E.2d 244 (Ill. 1951); *Amoco Prod Co. v. Charles B. Wilson, Jr. Inc.*, 266 Kan. 1084, 976 P.2d 941 (Kan. 1999); *Appeal of Concerned Corporators of Portsmouth Sav. Bank*, 129 N.H. 183, 525 A.2d 671 (N.H. 1987); *Silverman v. Bresnahan*, 35 N.J. Super. 390, 114 A.2d 307 (N.J. 1955); *Young v. Field*, 548 So. 2d 784 (Fla. 1989); *Van Stee v. Ransford*, 346 Mich. 116, 77 N.W.2d 346 (Mich. 1956); *Ellezy v. Fyr-Pruf Inc.*, 376 So. 2d 1328 (Miss. 1979).

matters concerning its dealings. (See Footnote 9, *supra*.) Montana's court, like every state court, employs its fiduciary duty law routinely to decline to enforce contracts when there has been a lack of disclosure. *See, e.g., Deist,* 208 Mont. at 228, 678 P.2d at 198; *Watson,* 239 Mont. at 368, 782 P.2d at 363. Contrary to Piper's suggestion, the Montana court's decisions at issue herein do not conflict in any way with the decisions of the appellate courts of other states. See *Petition for Writ of Certiorari,* pp. 22-24, n.15. The cases cited by Piper have nothing to do with the fiduciary duty which formed the basis of the Montana court's decision. Moreover, in that the laws relating to fiduciary duty and contract formation are the province of the states, any potential conflicts among the laws of such states relating to fiduciary duty and contract formation and revocation constitute permissible differences of opinion. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

Pursuant to Supreme Court Rule 10, a review on a writ of certiorari is not a matter of right but of judicial discretion and will be granted only for "compelling reasons." No compelling reasons exist for this Court to review the six unpublished decisions of the Montana court at issue herein. This is particularly true given that one of the six (Daly) was settled after the petition was filed. Further, no substantial federal questions are presented. Nor does an impermissible conflict among the state courts of last resort exist as to any federal question. Both the FAA and Montana's statutory law [Mont. Code Ann. § 27-5-114(2) (2003)] provide that arbitration agreements are valid "except where grounds exist at law or in equity to revoke the contract." Here, citing Section 2 of the FAA, the Montana court declined to enforce the arbitration provision in

question based upon the well-established Montana law concerning fiduciary obligations that it applies to all such contracts, not just contracts involving arbitration. For these reasons, the Montana court correctly considered and applied the Federal Arbitration Act law in connection with the facts of these cases, including those arising from Piper's unique "opt-out" policy which gave rise to a fiduciary duty to explain its existence and terms to the client. Given that the Montana court's analysis and application of state law generally governing contract formation is not in conflict with the FAA,[10] this Court should not review this matter on a writ of certiorari.

[10] At most, Piper has alleged the misapplication by the Montana court of a properly stated rule of law, a situation which this Court, pursuant to Supreme Court Rule 10, has concluded does not constitute the requisite "compelling reason" for granting a petition for certiorari.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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No. 05-86

In The Supreme Court of the United States

PIPER JAFFRAY & CO., and
ROBERT ENGLISH, et al.,

Petitioners,

v.

JOHN P. DALY and AUDREY M. DALY, JOHN D. SHEA and BRENDA SHEA, THE ESTATE OF ALICE A. FRANEY, ROBERTA J. EMETT and KATHLEEN E. MERRETT, VICKI BERRYMAN and JAMES LEARY,

Respondents.

On Petition For Writ Of Certiorari To The Montana Supreme Court

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INTRODUCTION

Petitioners seek this Court's review to ensure that the Montana Supreme Court complies with the Federal Arbitration Act, this Court's admonishment in *Doctor's Associates, Inc. v Casarotto*, 517 U.S. 681 (1996), and well-settled federal law with respect to the cases at issue here. Only then will the Montana courts begin to enforce arbitration provisions in a manner consistent with the Federal Arbitration Act, this Court's precedent and well-settled federal law.

> Inevitably a national corporation, like the Subway sandwich franchisor in *Casarotto*, will not tailor its arbitration clause or its waiver of rights to the requirements the Montana Supreme Court enumerated in *Kloss* and the arbitration provision will be struck down. The U.S. Supreme Court held in *Casarotto* that the legislature could not enact provisions that restrict arbitration in that situation. And in footnote three to that case, it warned the courts not to do what the legislature may not do. [citation omitted] But the Montana Supreme Court has now accomplished what the legislature was unable to do – the regulation if not the prohibition of pre-dispute arbitration clauses in Montana. It is possible that the higher court will right this wrong, or even that a reconstituted Montana Supreme Court will see things differently. Until that time, however, arbitration is dead in Montana.

Scott J. Burnham,[1] *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139, 200 (2005).

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[1] Scott J. Burnham is a Professor of Law at the University of Montana School of Law. Scott J. Burnham, *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139, n.1 (2005).

Contrary to Respondents' argument, this case is not about the Montana Supreme Court clarifying or applying Montana law concerning fiduciary duty. Instead, this case is about the Montana Supreme Court's continuing assault upon the Federal Arbitration Act, this Court's previous rulings, and federal policy and well-settled federal law favoring arbitration as a means of dispute resolution. This assault impermissibly ignores the prior precedent of this Court and must necessarily fail for that reason alone.

The Montana Supreme Court's holding that a broker dealer has a fiduciary duty to explain an arbitration clause, but no other contract provision to a prospective client, *before* the client signs the contract containing the arbitration clause, places arbitration clauses in a class apart from other contract provisions in violation of the Federal Arbitration Act. This Court chastised the Montana Supreme Court for precisely such action in *Casarotto*, but the Montana Supreme Court seems determined to ignore that admonishment and continue its misguided course. Despite Respondents' claim to the contrary, Petitioners raised this federal question to the Montana Supreme Court and that Court specifically held that the Federal Arbitration Act was not violated. *Willems*, ¶¶ 26, 27 (App. 33, 34).

The Montana Supreme Court does not uniformly apply its law pertaining to fiduciary duty. Instead, it applies a different and higher duty to arbitration provisions with the resultant effect of wholly invalidating pre-dispute arbitration provisions in standardized brokerage agreements in Montana. The Montana Supreme Court's decision is contrary to virtually every other federal and state court jurisdiction uniformly enforcing pre-dispute arbitration provisions and further impairs the contract

rights of broker dealers and their clients, thus placing an undue and substantial burden on interstate commerce in violation of the Commerce Clause.

I. The Salient Reasons For Granting Certiorari Have Not Been Challenged.

Respondents' Brief in Opposition is most telling in what it does not say. United States Supreme Court Rule 15.2 provides Respondents have an obligation to point out in their Brief in Opposition any perceived misstatements of fact or law in the Petition, otherwise the objection may be deemed waived. Respondents did not identify any perceived misstatements of law or fact in response to Petitioners' three principal arguments.[2]

With respect to Petitioners' first argument, Respondents do not dispute that the Montana Supreme Court held the *only* contract provision the broker had a fiduciary duty to explain was the arbitration provision. Respondents instead argue this holding does not single out arbitration clauses, but is consistent with Montana's fiduciary duty of "full disclosure." Resp'ts' Opp'n at p. 9. Full disclosure,

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[2] The first three pages of Respondents' Brief in Opposition contain factual allegations that are unproven and wholly irrelevant to this Court's analysis and decision. Respondents' recitation of irrelevant allegations is inappropriate and should not be considered by this Court. Moreover, entirely absent from Respondents' purported factual statement are any allegations touching upon fraud or duress with respect to the arbitration clause itself. The absence of such potentially relevant allegations is understandable because no such allegations have been made throughout the course of these proceedings. Indeed, the Montana Supreme Court has found that the arbitration clause was not discussed when the agreement was signed. *Willems* ¶ 25.

however, would require the broker to explain *every* provision, not just the arbitration provision.

Further, Respondents offer no response to Petitioners' description of Montana's historical hostility toward arbitration. Respondents fail to come to grips with the fact that the instant rulings are fundamentally no different than the Montana Supreme Court's rulings in the *Casarotto* series of cases[3] in which this Court struck down a Montana statute which treated arbitration clauses differently than any other contract provision.

It is no wonder Respondents made the tactical decision to ignore the fundamental holding in *Casarotto,* because it is apparent from the Brief in Opposition they either misapprehend or have intentionally misstated the express language of the Federal Arbitration Act and the previous decisions of this Court interpreting that Act, including most notably *Perry v. Thomas*, 482 U.S. 483 (1987). In *Perry*, this Court specifically admonished that courts may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot." *Perry, supra*, at 492, n.9.

Respondents ignore in the first instance that the Federal Arbitration Act limits the application of state law to only that law providing for revocation of the contract generally. *Id*. Respondents also ignore the fact that the

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[3] *Doctor's Associates, Inc. v. Casarotto*, 515 U.S. 1129 (1995); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994); *Casarotto v. Lombardi*, 901 P.2d 596 (Mont. 1995).

Montana Supreme Court has not found that sufficient grounds exist for the revocation of the customer agreements at issue here on the basis of fraud, fraudulent inducement, mutual mistake, or any other of the grounds generally applicable in state contract law. Rather, the Montana Court singled out the arbitration provision alone for invalidation and otherwise left the contracts in place and enforceable.

The ruling of the Montana Court created an impossible burden for any broker dealer to meet by requiring a nebulous affirmative obligation to disclose and explain the arbitration provision, and only the arbitration provision, in a level of detail which inexplicably goes beyond the written disclosure which is already found in the contracts at issue and which complies with the Montana Court's own earlier requirement enunciated in *Mueske v. Piper Jaffray & Hopwood, Inc.*, 859 P.2d 444 (Mont. 1993). In so doing, the Montana Supreme Court has impermissibly imposed a burden which is incapable of determination or satisfaction, and significantly greater than the legislatively created burden that was found unacceptable in *Casarotto*. Simply put, the Montana Court has impermissibly singled out arbitration clauses in a way which this Court has already rejected. The Montana Supreme Court must heed the admonishment of both *Casarotto* and *Perry*: that it may not do what the legislature cannot.

Further, Respondents concede a fiduciary duty between an investment advisor and his or her client does not exist absent a grant of discretionary authority, but Respondents do not address Petitioners' argument that a fiduciary duty created by an agreement cannot exist *before* the agreement creating the duty is signed. Resp'ts' Opp'n at pp. 9-10; (*citing Chor v. Piper Jaffray & Hopwood Inc.*,

862 P.2d 26, 32 (1993)). The Montana Supreme Court's creation of such a pre-existing fiduciary duty merely serves to underscore its result oriented analysis and pre-determined objective to strike down pre-dispute arbitration clauses.

Respondents also repeatedly misstate the Montana Supreme Court's findings. Respondents incorrectly state the Montana Supreme Court held Petitioners had a fiduciary duty to explain Piper's policy permitting clients to cross out the arbitration provision. Resp'ts' Opp'n at pp. 3, 10. The Montana Supreme Court, however, did not find Piper had a fiduciary duty to explain the opt-out policy as it stated, "We affirm the District Court's conclusion that Piper owed a fiduciary duty to explain the arbitration provision to Willems. . . . " *Willems* ¶ 28 (App. 34).

Respondents also fail to explain how the Montana Supreme Court's reference to *Kloss* is a proper application of state law when the facts in *Kloss* are significantly different than those here. *Kloss v. Edward D. Jones*, 2002 MT 129, 310 Mont. 123, 54 P.3d 1, *cert. denied*, 538 U.S. 956 (2003) ("*Kloss I*"); *see also*, *Kloss v. Edward D. Jones*, 2002 MT 129A, 54 P.3d 41, *cert. denied*, 538 U.S. 956 (2003) ("*Kloss II*").

In *Kloss*, Mrs. Kloss began a relationship with her broker in 1985, opened a full service account in 1989 and established a living trust account in 1992. *Kloss I* at 125-26, 54 P.3d at 3-4. Both account agreements contained arbitration provisions (*Kloss I* at 126, 54 P.3d at 4), and the 1992 agreement contained the same discretionary language deemed by the *Kloss* court to create a fiduciary duty. *Kloss II*, 57 P.3d at 41.

The fiduciary duty in *Kloss* was presumably created six years before Mrs. Kloss opened the account in question, the 1998 charitable trust, because the discretionary language deemed by the *Kloss* court to create a fiduciary duty was present in the 1992 agreement. Another significant distinguishing fact is that in 1998, when Mrs. Kloss opened her charitable trust account, she did not even sign the account agreement, but instead signed a detachable card acknowledging she received a copy of the agreement and incorporating an arbitration clause by reference. *Kloss I* at 126, 54 P.3d at 4. In contrast, here, the agreements signed by the customers contained the arbitration provisions, and also contained a thorough explanation of arbitration in the language of the arbitration provisions themselves. (App. 63-64). This language was approved and mandated by the U.S. Securities and Exchange Commission ("SEC"). Rule 3110(f) National Association of Securities Dealers ("NASD") Manual. Thus, to the extent any explanation of the arbitration clause was needed, it was provided in a manner consistent with the requirements of the SEC and NASD.

With respect to Petitioners' second argument, Respondents do not explain why Montana appears to be the only state that does not enforce pre-dispute arbitration agreements in securities contracts. In two sentences, Respondents dismiss Petitioners' extensive list of contrary decisions in other states in footnote fifteen of the Petition by stating these decisions do not conflict with the decisions below and have nothing to do with the basis of the Montana Supreme Court's decision. Resp'ts' Opp'n at p. 12. Not only is this explanation vague and meaningless, but it is also contrary to the numerous cases listed in footnote fifteen.

With respect to Petitioners' third argument, Respondents do not dispute that the Montana Supreme Court's decisions will impair the Petitioners' and other broker-dealers' ability to rely upon uniform agreements drafted in compliance with SEC regulations when executed in Montana by Montana clients. Respondents also do not challenge Petitioners' arguments that the Montana Supreme Court's decisions violate the Commerce Clause because they will place an undue and substantial burden on interstate commerce by impairing Petitioners' right to contract in Montana.

II. *Willems* And The Cases Based On *Willems* At Issue Here Establish A Dangerous Precedent For Undermining Arbitration Provisions Nationally.

The *Willems* decision was recently identified as one in a series of cases that will roll back the enforcement of predispute arbitration laws, in contravention of established U.S. Supreme Court precedent:

> The passage of time and events, particularly the increased use of contracts of adhesion containing mandatory arbitration clauses to avoid judicial enforcement of federal and state anti-discrimination and consumer protection laws, is leading many appellate courts to distinguish and weaken the significance of these [U.S. Supreme Court] precedents from an earlier time in the development of arbitration law.

Barrett v. McDonald Investments, Inc., 870 A.2d 146, 153 (Me. 2005) (Alexander, J., concurring).

The enforceability of arbitration clauses is clearly under siege in Montana, and one commentator has indeed suggested that the battle is already over. *See* Burnham, Scott J., *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139, 201 (2005) (" . . . arbitration is dead in Montana"). Absent immediate intervention by this Court, the Montana Supreme Court's continuing refusal to heed this Court's rulings or enforce the Federal Arbitration Act will be assured.

CONCLUSION

For the foregoing reasons and those stated previously, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted this 6th day of October 2005.

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